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Supreme Court, U.S.
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No. 00-586

In The

Supreme Court of the United States

RANDALL WARE, et al.,

Petitioners,

v.

HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Oklahoma Supreme Court

RESPONDENT HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether individual tribal members have standing to assert tribal claims?

2. Whether a state law, adopted pursuant to a federal law that approved state created Indian housing authorities and that defines certain procedures of operation for the Indian housing authorities, infringes upon an Indian tribe's ability to self-govern when the tribe voluntarily chose to establish and operate its housing authority under the state law?

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RESPONDENT HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners, Randall Ware, Richard Kauahquo, Carol Frame, William Tartsah and Wendell Autaubo (hereinafter "Petitioners")[1] are seeking review of an unanimous decision by the Oklahoma Supreme Court that affirmed the well-reasoned decision of the Caddo County District Court. Both the Oklahoma Supreme Court and the Caddo County District Court held, pursuant to established, authoritative precedent, that the state court had jurisdiction to interpret the Oklahoma Housing Authorities Act, specifically 63 O.S. § 1057, as it relates to Indian housing authorities. Petitioners have not previously argued this point; in fact, Petitioners conceded the point before the Oklahoma Supreme Court stating that "[t]he very basic question in this case is no more than deciding the proper meaning of an Oklahoma statute." Appellants' Brief-in-Chief, p. 2.[2] Petitioners now assert, without prec-

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[1] Respondent's original Petition filed in the District Court of Caddo County named the Petitioners as Defendants without designation as to individual or official capacity and the case has continued with that style until now; however, in Petitioners' filing in this Court, Petitioners have now identified themselves as having an official capacity. This is a wrongful substitution of parties and should be ignored by the Court.

[2] Respondent's counsel has not been provided or able to obtain a complete copy of the record in this matter. Therefore, some cites to the record, by necessity, will be to the individual document rather than to the page of the record. Respondent apologizes for any inconvenience this may cause.

edent or statutory basis and without standing to assert such a claim, that the Oklahoma Housing Authorities Act infringes upon the Kiowa Tribe's right of self-government. Because Petitioners failed to present any valid argument for the asserted position, the Petition for Writ of Certiorari must be denied.

A. BACKGROUND

The statutory authority for housing programs for what later became the United States Department of Housing and Urban Development ("HUD") was contained in the United States Housing Act of 1937 ("1937 Act"), which authorized loans for development and administration of public, low rent housing.[3] Indian participation in such programs was approved by a 1940 Interior Solicitor opinion that concluded that Indian tribes are governmental entities capable of undertaking housing enterprises.[4] However, it wasn't until 1961 that HUD's predecessor, the Public Housing Administration, determined that Indian tribes with established governing bodies could participate in its housing programs. For funding purposes, regulations allowed an Indian housing authority to be created pursuant to either state or tribal law.[5]

On June 18, 1965, the State of Oklahoma enacted the "Oklahoma Housing Authorities Act" which is codified at

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[3] Act of September 1, 1937, ch. 896, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437-1437j).

[4] 57 Interior Dec. 145 (1940).

[5] 24 C.F.R. §§ 805.108-.109 (1980).

63 O.S. § 1051 *et seq.* The creation of Indian housing authorities within the State was expressly provided for at 63 O.S. § 1057. See Petition for Certiorari, Appendix, p. 16. The operation of each of these Indian housing authorities was contingent upon the governing council of each tribe adopting a resolution declaring the need for a housing authority to function for the tribe. Four years later, on February 8, 1969, the Kiowa Tribe, in an exercise of its tribal powers, adopted Resolution No. 69-1 and made such a declaration as follows:

> BE IT RESOLVED, by the Kiowa Tribal Council that the Kiowa Tribe shall enter fully into such housing programs and to that end the Kiowa Tribal Interim Business Committee is authorized and directed to initiate action to participate in available housing programs for the benefit of those interested Kiowa tribal members and *to create a tribal housing authority in accordance with the provisions of the Oklahoma Housing Authorities Act* . . .

See R. 77 (emphasis added).

A few days later, on March 1, 1969, the Kiowa Interim Business Committee adopted Resolution No. 69-10, which states in pertinent part as follows:

> Section 1. The Kiowa Tribal Interim Business Committee of the Kiowa Tribe of Indians of Oklahoma, hereby determines, finds and declares in pursuance of the "Oklahoma Housing Authorities Act" that:
>
> * * *

C. There is a need for the Housing Authority of the Kiowa Tribe of Indians of Oklahoma to function.

Section 2. In accordance with the foregoing finding the Housing Authority of the Kiowa Tribe of Indians of Oklahoma, *is authorized to transact business and exercise its powers pursuant to the "Oklahoma Housing Authorities Act."*

See R. 354 (emphasis added).

On March 23, 1970, the Constitution and Bylaws of the Kiowa Indian Tribe of Oklahoma ("Constitution") was ratified by a vote of the Kiowa people. The Constitution, as the organic law for the Kiowa Tribe, defined and established the organization of the tribe's government. Article I, Section 2 defines the Kiowa Indian Council ("KIC"), a group composed of all tribal members who are at least eighteen (18) years of age or over, as the governing body of the tribe. Consistent with this plan of hierarchy, Article V defines the powers of the KIC and reserves to the KIC all powers not vested in the Business Committee.[6] Although the Constitution contains no direct

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[6] The powers of the Kiowa Business Committee are outlined in Article V, Section 2 as follows:

a. Revocable permits, farm and grazing leases; oil, gas and mineral leases; easements and rights-of-way.

b. Appoint subordinate committees

c. Promote arts and crafts and Kiowa Indian Culture

d. Prepare annual budgets for submission to and approval of the Kiowa Indian Council

mention of the housing authority, it is clear that any powers relative to the housing authority and appointment of its Commissioners have been retained by the KIC. The practice of the Tribe and the record in this case reflect that since adoption of the Constitution in 1970, housing authority commissioners have been elected by the KIC.

B. CURRENT LITIGATION

On May 13, 1998, the KHA was informed of the unlawful appointment of the petitioners as Commissioners of the KHA. See R. 333. On May 15, 1998, the KHA

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e. Accept applications for tribal employment and submission to the Kiowa Indian Council for selection

f. Determine term of employment and salary of tribal employees

g. To promulgate and enforce ordinances and codes governing law and order to protect the peace, health, safety and general welfare, on land determined to be within tribal jurisdiction subject to the approval of the Assistant Secretary for Indian Affairs or his authorized representative. (Amended 6/84)

h. Develop, negotiate and approve economic, industrial and commercial enterprises and leases on land owned solely by the Kiowa Tribe as long as the terms of any such lease (including option) does not exceed fifty (50) years. (Amended 6/85)

i. The Kiowa Business Committee shall be authorized to promulgate and enforce codes and ordinances to levy and collect taxes within the area of the tribe's jurisdiction, except that no tax shall be levied or collected on the lease income of the Kiowa tribal members or on the value of individually owned trust property. (Amended 6/85)

filed its Petition in the Caddo County District Court against the five named individuals requesting injunctive relief to prevent the Petitioners from wrongfully assuming control of the housing authority and a declaratory judgment determining that its officers, who were duly elected by the KIC, were the lawful Board of Commissioners of the KHA and requesting a finding that the Kiowa Indian Council, as the governing body of the Kiowa Tribe, must elect Commissioners for KHA. This court action by KHA was in response to unlawful attempts by the individual Petitioners, pursuant to unconstitutional appointments by the Chairman of the Kiowa Business Committee, to take control of the KHA and all its assets in total disregard of long-standing state and tribal law.

In response, Petitioners argued that the appointment powers of the Chairman of the Kiowa ***Interim*** Business Committee had succeeded to the current Chairman of the Kiowa Business Committee despite the approval and passage of the Kiowa Constitution in 1970 and its clear language to the contrary. In the lower Court, Petitioners attempted to avoid the clear mandate of the Kiowa Constitution by asserting that the term "governing body" as used in the state law did not indicate a clear intent. This confusing and inaccurate argument was correctly rejected by the Caddo County District Court on June 4th, 1999. Judge Richard G. Van Dyck, after a full hearing and briefing by the parties, held, in part, as follows:

> 5. A reading of 63 O.S. § 1057 finds that commissioners of the housing authority are to be appointed by the governing head of the entity creating the authority.

6. Article I, Section 2 of the Constitution and Bylaws of the Kiowa Tribe of Oklahoma (Constitution) clearly states that the governing body of the tribe is the Kiowa Indian Council (KIC).

7. Nowhere in the Constitution does it empower the Kiowa Business Committee (KBC) to appoint commissioners to the housing authority. Article V, Section 2 sets out the powers of the KBC. Those powers do not include appointing commissioners to the housing authority.

8. Nowhere in the Constitution does it continue the Kiowa Interim Business Committee. . . .

9. When the Constitution was ratified the Kiowa Interim Business Committee ceased to exist and the terms of the Constitution governed the tribe and its operations.

* * *

Therefore this court finds and orders that Commissioners of the Kiowa Housing Authority are to be elected to their positions by a vote of the KIC.

Petition for Writ of Certiorari, Appendix, pp. 12-14

Petitioners appealed the decision to the Oklahoma Supreme Court proposing the primary issue of whether Oklahoma law allows the Chairman of the Kiowa Business Committee to appoint commissioners or requires the entire voting membership of the tribe (the Kiowa Indian Council) to elect commissioners by popular vote in a tribal election. Appellants' Oklahoma Supreme Court

Brief-in-Chief, pp. 1-2. Under the misconception that the District Court had ordered the tribe to hold an election, Petitioners also briefed the issue of sovereign immunity and jurisdiction. The KHA did not file a brief in the Supreme Court of Oklahoma choosing instead to rely on the trial court's findings of fact and conclusions of law.

The Supreme Court of Oklahoma, on July 18, 2000, unanimously affirmed the District Court and held that jurisdiction was proper pursuant to authoritative case law previously decided by that Court, ***Housing Authority of the Choctaw Nation v. Craytor***, 1979 OK 100, 600 P.2d 314 (Okla. 1979), and that sovereign immunity was not an issue because neither the tribe nor tribal officials had been sued. Further, the Court held that the state law required that the commissioners be appointed by the governing head of the tribe. After analyzing the Kiowa Constitution in relation to the requirements of the state law, the Court concluded that the Kiowa Constitution clearly defined the Kiowa Indian Council ("KIC") as the governing body of the tribe and that the KIC, *not* the Kiowa Business Committee or its Chairman, had the authority to choose the Commissioners for the KHA and that the proper process for this appointment was an election. The Court clarified and affirmed the position of the Trial Judge by stating as follows:

> The trial court correctly ruled that under the provisions of pertinent state law, the Kiowa Indian Council was the governing body with power to appoint commissioners to the Kiowa Housing Authority and ruled that an election is

> the proper procedure for selecting those commissioners. *The trial judge did not* ***order*** *the Kiowa Tribe to conduct an election, nor could he have done so.* It is, in effect, of no concern to the state courts whether an election is in fact held. The trial court merely interpreted a state statute to mean that the Kiowa Indian Council is the governing body of the tribe and declared that the proper procedure for choosing commissioners to the Kiowa Housing Authority is by election.

Petition for Writ of Ceriorari, Appendix, p. 9.

The Petitioners, in an abrupt change of position, now abandon their argument regarding the necessity of the interpretation of the state law and instead assert that the state law infringes on the tribe's right of self-government. Petitioners have taken a careless position that attempts to mix and confuse tribal sovereignty and tribal right of self-government with the requirements of a state law, adopted pursuant to federal law and endorsed by the Tribe, that needs only a clear interpretation of the Kiowa Constitution for its enforcement. By definition, infringement on the tribe's sovereignty or right of self-government cannot exist under the auspices of the Oklahoma Housing Authorities Act. The Kiowa Tribe chose to have a functioning housing authority pursuant to the provisions of the Oklahoma Housing Authorities Act, 63 O.S. § 1051 *et seq.* The Kiowa Tribe, as well, chose to clearly designate the KIC as the governing body of the tribe and to limit the authority of the KBC and its Chairman. Rather than an infringement on the tribe's right of self-government, this state law presented the opportunity for the tribe to exercise its right to self-government which it did in passing the resolution to organize the KHA under the laws of

the State of Oklahoma. There is no precedent or statutory basis for the arguments presented by the Petitioners and the Petition for Certiorari must be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

A petition for writ of certiorari is granted for "compelling reasons."[7] Because the Petitioners have not

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[7] Sup. Ct. Rule 10 states as follows:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. *A petition for a writ of certiorari will be granted for compelling reasons.* The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that

articulated any compelling reason for granting certiorari, the petition must be denied.

I. THE WRIT MUST BE DENIED BECAUSE THE KIOWA TRIBE IS NOT A PARTY TO THIS SUIT AND PETITIONERS LACK STANDING TO ASSERT TRIBAL CLAIMS

The Petitioners named in this lawsuit are five individuals who were wrongfully appointed by the Chairman of the Kiowa Business Committee and who attempted to wrongfully take control of the KHA in violation of state and tribal law. The Tribe is not a named party and, as an entity, is not implicated in the allegations contained in the Respondent's original Petition. Therefore, tribal sovereignty, which is subtlety argued by the Petitioners,[8] is not applicable to the instant matter. The Supreme Court of Oklahoma recognized this long standing principle and held that "sovereign immunity does not extend to individual members of the tribe." ***Housing Authority of the Kiowa Tribe of Oklahoma v. Ware***, 2000 OK 60, ___ P.3d ___ (Okla. 2000), *citing* ***United States v. James***, 980 F.2d 1314, 1319 (9th Cir. 1992), ***cert. den., James v. U.S.***, 510 U.S. 838 (1993), *citing* ***Puyallup Tribe, Inc. v. Washington Game Dep't.***, 433 U.S. 165, 173, 97 S. Ct. 2616, 2621, 53

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conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

[8] Petition for Certiorari, pp. 13, 14, and 17.

L.Ed.2d 667 (1977). Contrary to the Petitioners' assertions that the Oklahoma Supreme Court avoided the holding in ***Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.***, 523 U.S. 751 (1998), sovereign immunity is clearly not applicable.

Petitioners, as the named individual defendants, lack standing to assert claims relating to tribal infringement. It is the Kiowa Tribe, not the individual defendants, that would suffer harm if the state law did, in fact, infringe on the Tribe's right to self-govern. Further, Oklahoma precedent has established that standing is composed of at least three elements, including 1) a legally protected interest which must have been injured in fact; 2) a causal nexus between the injury and the complained of conduct; and, 3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision. ***Cities Service Company v. Gulf Oil Corporation,*** 1999 OK 16, 976 P.2d 545 (Okla. 1999). Petitioners have no legally protected interest at stake and most importantly, no likelihood exists that a favorable decision will be issued to redress any perceived injury. Therefore, the Petitioners lack standing to assert the tribal claims. See also ***Lujan v. Defenders of Wildlife,*** 504 U.S. 555 (1992) ("Standing is particularly difficult to show here, since third parties, rather than respondents, are the object of the Government action or inaction to which respondents object.")

II. THE WRIT MUST BE DENIED BECAUSE THE OKLAHOMA HOUSING AUTHORITIES ACT DOES NOT INFRINGE ON THE TRIBE'S RIGHT TO SELF-GOVERN

Petitioners have alleged that the Oklahoma Housing Authorities Act, specifically 63 O.S. § 1057, infringes on the Kiowa Tribe's right to self-govern and therefore the requested writ should issue. Notwithstanding that this argument was not seriously advanced in the lower court and therefore not addressed by the Oklahoma Supreme Court, Petitioners' argument exhibits a fundamental misunderstanding and therefore misapplication of the infringement doctrine.

"Infringement" is defined as "a trespass or encroachment upon". Black's Law Dictionary, Revised 4th Edition, p. 920. It has been a long-standing practice of this honorable Court to use the principle of infringement to protect Indian tribes from unlawful encroachment by state governments upon the tribe's ability to make laws and be governed by them. ***Williams v. Lee***, 358 U.S. 217, 220 (1958). This principle, known as the infringement test, protects the inherent right of Indian tribes to be self-governing. However, the cases and rationale in this area are easily distinguishable from the instant matter.

Williams v. Lee[9] as well as ***Fisher v. Dist. Court***[10] both cited for support by the Petitioners, involve disputes arising on the reservation that should have been resolved by the tribal court according to tribal laws. The conflict

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[9] 358 U.S. 217 (1958).

[10] 424 U.S. 382 (1976).

here is between two groups of tribal members, both of whom claim to be the properly appointed or elected commissioners of a housing authority voluntarily created under state law, located within the state jurisdiction, and operating its business according to state law within the state jurisdiction.[11] This dispute, therefore, arises outside of Indian country and requires a decision made pursuant to state law. This difference, though possibly seen as slight by Petitioners, is key in determining whether the infringement test is applicable.

In 1979, the Oklahoma Supreme Court recognized the state law aspect of such a determination in ***Housing Authority of the Choctaw Nation v. Craytor***, 1979 OK 100, 600 P.2d 314 (Okla. 1979). In ***Craytor***, similar to the instant case, the Oklahoma Supreme Court was required to determine which of two groups of individuals claiming to be the rightfully appointed Commissioners of the Housing Authority of the Choctaw Nation was the legally correct group. The Court held, in part, as follows:

> [I]ndeed, District Courts do have jurisdiction over the Housing Authorities, for the Authority became a public body, both corporate and politic, by virtue of the Oklahoma Housing Authority Act and by virtue of the Choctaw Nation's voluntary choosing to have a functioning Authority under the Act.

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[11] Contrary to Petitioners' assertions that KHA operates within the tribal jurisdiction, KHA currently owns 183 houses, 171 located on non-trust property and 12 located on trust property.

> The powers, duties, and responsibilities of the Housing Authority and its officers are established and defined in the Act, not by tribal law. Thus, the questions raised in the District Court are all questions which can be answered by interpreting the powers of appointment and removal established by the Act – all questions which the District Court has jurisdiction over.

Id.

Consistent with ***Craytor***, the Oklahoma Supreme Court again found that the state-created tribal housing authorities are subject to the jurisdiction of the state courts in ***Eaves v. State of Oklahoma***, 1990 OK CR 42, 795 P.2d 1060 (Okla. Crim. App. 1990). In ***Eaves***, an Osage Indian accused of murdering his father within a housing project owned by the Osage Tribal Housing Authority was tried for the murder in state court. The Osage Tribal Housing Authority is organized under the laws of the State of Oklahoma, specifically, 63 O.S. § 1057. Citing ***Craytor***, the Court held that 63 O.S. § 1057 clearly identifies tribal housing authorities as state agencies and agreed that those housing authorities are subject to the jurisdiction of the state courts.

The Tenth Circuit Court of Appeals has as well recognized the state character of Indian housing authorities formed pursuant to the Oklahoma Housing Authorities Act. In ***Housing Authority of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City***, 952 F.2d 1183 (10th Cir. 1991), the Court held that because "[s]tate law grants to the Kaw Tribe the authority to establish and administer the Kaw Housing Authority", *Id.* at 1192, the Kaw Housing Authority could not assert federal constitutional

rights against another political subdivision of the State, the City of Ponca City. The Court clearly stated that political subdivisions, such as the Kaw Housing Authority, are creatures of the state, and as such are prohibited from bringing actions against fellow subdivisions. Although jurisdiction was not at issue in this case, the decision is a clear indication of the state law character of the housing authorities formed pursuant to the Oklahoma Housing Authority Act and its activities.

Another major difference between the cases cited by the Petitioners in support of the infringement argument and the instant matter is the existence of a federal statute allowing for state involvement. In ***Williams***[12], supra, there was no federal statute allowing the business owner to use the state courts for collection of his debt. Likewise, in ***Fisher***, supra, no federal statute existed to grant the plaintiff access to state court to determine the custody of an Indian child where all parties were reservation Indians. However, the State of Oklahoma, in passing the Oklahoma Housing Authorities Act, acted pursuant to a federal law, specifically the Housing Act of 1937, 42 U.S.C. § 1437 (1988). The regulations promulgated pursuant to the Act provide that an Indian housing authority may be created by ***either*** a tribal ordinance or pursuant to state law. 24 C.F.R. § 125-26 (1991). Furthermore, the

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[12] In the process of discussing the question of whether state action infringes on the affairs of reservation Indians, the Court in ***Williams*** noted that "[e]ssentially, ***absent governing Acts of Congress***, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. (emphasis added.)

current replacement statute, NAHASDA and its regulations, carry on this very same recognition and opportunity. The Oklahoma Housing Authorities Act was enacted to enable tribes to share in available federal funds through the Department of Housing and Urban Development ("HUD") to provide safe and sanitary housing for their members and no aspect of these statutes and regulations suggest a limitation on the tribal right of self-government.

It is clear that Congress, an entity with plenary power over the affairs of Indians, intended for tribes to form housing authorities under either tribal or state law. The fact that the Kiowa Tribe chose to form its housing authority under state law in 1969 exhibits a tribal action consistent with Congressional intent – not infringement of its powers of self-government. To rule otherwise would remove the ability of tribes to compact, contract or cooperate with the state or state-charted entities.

III. THE WRIT MUST BE DENIED BECAUSE CONGRESS' POLICY OF TRIBAL SELF-DETERMINATION DOES NOT PROHIBIT OR EXCLUDE HOUSING AUTHORITIES CREATED PURSUANT TO STATE LAW

Petitioners argue that Congress has adopted a policy of tribal self-determination that, by definition, prohibits state-created housing authorities. Closer scrutiny of the federal laws involved reveal, however, that state-created Indian housing authorities are acknowledged with approval in both the Housing Act of 1937 as well as the more recent federal law concerning Indian housing, the

Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 25 U.S.C. § 4101 *et seq.* The Housing Act of 1937 and its regulations allowed for housing authorities created under either tribal ordinance or state law to participate in HUD programs. 24 C.F.R. §§ 805.108-.109 (1980). That recognition of the unique circumstances in Oklahoma and other states that allowed tribal housing authorities to be created pursuant to state law has been carried over to the more recent NAHASDA. In NAHASDA, "tribally designated housing entity" is defined as including those entities established by operation of State law providing specifically for housing authorities or housing entities for Indians[13]. The definitions provided in the regulations promulgated pursuant

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[13] 25 U.S.C. § 4103(21)(B)(ii) states in pertinent part as follows:

> (21) TRIBALLY DESIGNATED HOUSING ENTITY. – The terms "tribally designated housing entity" and "housing entity" have the following meaning:
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> * * *
>
> (B) OTHER ENTITIES. – With respect to any Indian tribe that, pursuant to this Act, authorizes an entity other than the tribal government to receive grant amounts and provide assistance under this Act for affordable housing for Indians, ***which entity is established*** –
>
> * * *
>
> (ii) ***by operation of State law*** providing specifically for housing authorities or housing entities for Indians, including regional housing authorities in the State of Alaska,
>
> the terms mean such entity.

(emphasis added.)

to NAHASDA define Indian Housing Authority to include state-created housing authorities as well[14].

Clearly, in reaffirming and restating its policy of tribal self-determination, it is not Congress' intent to exclude or prohibit those housing authorities in existence prior to NAHASDA and created under state law in furtherance of the Housing Act of 1937. The clear congressional intent was to include the many state-created housing authorities. Any argument to the contrary merely overlooks the clear language of the statute and regulations. It is exactly because of the principles of self-determination that tribes in Oklahoma have had and should continue to have the ability to choose whether or not to participate in the state housing authority scheme.

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[14] 24 C.F.R. § 1000.10 defines "Indian Housing Authority" as follows:

> *Indian Housing Authority (IHA)* means an entity that:
>
> (1) Is authorized to engage or assist in the development or operation of low-income housing for Indians under the 1937 Act; and
>
> (2) ***Is established:***
>
> * * *
>
> (ii) ***By operation of state law*** providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

(emphasis added.)

IV. THE WRIT MUST BE DENIED BECAUSE THE OKLAHOMA HOUSING AUTHORITIES ACT DOES NOT INFRINGE ON THE KIOWA TRIBE'S DESIGNATED TRIBAL COURT

Petitioners argue that the existence of the Oklahoma Housing Authorities Act somehow infringes upon the authority of the Tribe's tribal court. Notwithstanding Petitioners' lack of standing to advance such an argument,[15] such is clearly not the case. Included in Petitioners' Appendix, p. 26, is an Order from the Court of Indian Offenses which is a clear indication of the functionality of the Tribe's designated tribal court. The Court of Indian Offenses, created by regulation of the Secretary of the Interior,[16] 25 C.F.R. § 11.100 (1996), is a court of

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[15] See Section I, supra.

[16] 25 C.F.R. § 11.100 states, in pertinent part, as follows:

Listing of Courts of Indian Offenses.

(a) Except as otherwise provided in this title, the regulations under this part are applicable to the Indian country (as defined in 18 U.S.C. § 1151) occupied by the following tribes:

* * *

(9) For the following tribes located in the former Oklahoma Territory (Oklahoma):

* * *

(xii) Kiowa Tribe of Oklahoma

(b) It is the purpose of the regulations in this part to provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of state jurisdiction but where tribal courts have not been established to exercise that jurisdiction.

limited jurisdiction[17] operating pursuant to regulations and certain codes approved by the Bureau of Indian Affairs. The Order contained in Petitioners' Appendix, p.

(c) The regulations in this part shall continue to apply to tribes listed under Sec. 11.100(a) until a law and order code which includes the establishment of a court system has been adopted by the tribe in accordance with its constitution and by-laws or other governing documents, has become effective, and the Assistant Secretary – Indian Affairs or his or her designee has received a valid tribal enactment identifying the effective date of the code's implementation, and the name of the tribe has been deleted from the listing of Courts of Indian Offenses under Sec. 11.100(a).

[17] 25 C.F.R. § 11.104 states as follows:

Jurisdictional limitations.

(a) No Court of Indian Offenses may exercise any jurisdiction over a Federal or state official that it could not exercise if it were a tribal court.

(b) Unless otherwise provided by a resolution or ordinance of the tribal governing body of the tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction, no Court of Indian Offenses may adjudicate an election dispute or take jurisdiction over a suit against the tribe or adjudicate any internal tribal government dispute.

(c) The decision of the BIA on who is a tribal official is binding in a Court of Indian Offenses.

(d) The Department of the Interior will accord the same weight to decisions of a Court of Indian Offenses that it accords to decisions of a tribal court.

(e) A tribe may not be sued in a Court of Indian Offenses unless its tribal governing body explicitly waives its tribal immunity by tribal resolution or ordinance.

26, reflects the Magistrate's recognition of his limited jurisdiction and his belief that the proper forum for this dispute would have been the federal courts. Lack of jurisdiction in the Court of Indian Offenses must not be fashioned into some type of infringement for the convenience of the Petitioners.

V. THE WRIT MUST BE DENIED BECAUSE WITHOUT REGARD TO STATE LAW, TRIBAL LAW DOES NOT PERMIT PETITIONERS' APPOINTMENT AS HOUSING AUTHORITY COMMISSIONERS

Petitioners argue that all actions taken by the Chairman of the Kiowa Business Committee are consistent with tribal law[18] and that it is the state law that dictates the method of choosing commissioners for the Indian housing authority thereby causing the state law to infringe on the tribe's right to self govern. Such argument is without merit. In truth, the state law allows the choice of commissioners to be made by the "Chief or other governing head of an Indian tribe, band, or nation". 63 O.S. § 1057. The state law does not require a specific method of selecting the commissioners – that is clearly within the parameters of the authority of the tribe. The state law's only requirement is that the choice be made by

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[18] Petitioners state that the "Chairman of the Kiowa Business Committee, *acting under tribal law,* appointed Petitioners as the new KHA commissioners." Petition for Certiorari, pp. 9-10. "[T]he District Court of Caddo County voided political action *taken under tribal law . . .* " Petition for Certiorari, p. 12. " . . . *appointments legal under tribal law . . .* " Petition for Certiorari, p. 13.

the "Chief or other governing head", similar to the requirement for mayors of cities to make like appointments for city housing authorities.

The Kiowa Constitution, adopted and ratified by the Kiowa people over thirty years ago, reserves all authority to the Kiowa Indian Council[19] not expressly granted to the Kiowa Business Committee. See fn. 4. The power to appoint housing authority commissioners is not expressly granted to the Kiowa Business Committee and is therefore a power retained by the Kiowa Indian Council. The Kiowa people, in a sovereign act of self-government, chose to restrict the powers of the Kiowa Business Committee, and therefore the powers of the Chairman of the Kiowa Business Committee, by adopting and ratifying a Constitution with a balanced power structure that allowed the Kiowa Indian Council exclusive authority over the selection of housing authority commissioners. Without regard to the state law, the housing commissioners of the tribal housing authority must be selected by the Kiowa Indian Council, which has the capability to speak exclusively through the election process. The Caddo County District Court and ultimately the Oklahoma Supreme Court recognized this constitutional requirement and held that the method required by the Kiowa

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[19] In outlining the authority of the Kiowa Indian Council, Kiowa Constitution Article V, Section 1(h) states as follows:

* * *

h. All other powers not vested in the business committee by Section 2 of this Article shall be retained by the Kiowa Indian Council.

* * *

Constitution for selection of the tribal housing authority commissioners was by election.[20] Clearly, it is not "Oklahoma's exercise of judicial power" that mandates the selection process for tribal housing authority commissioners, but rather, it is the organic law of the Kiowa Tribe of Oklahoma – the Kiowa Constitution.

VI. CONCLUSION

Petitioners were appointed as commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma, an entity organized and operating pursuant to the laws of the State of Oklahoma, in violation of state and tribal law. Upon notice of the illegal appointment, Respondent sought injunctive relief through the proper forum of the Caddo County District Court. Pursuant to long-standing authoritative precedent, the Caddo County District Court and the Oklahoma Supreme Court, in an unanimous decision, held that because the Kiowa Constitution clearly

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[20] Neither the Caddo County District Court or the Oklahoma Supreme Court ordered the Kiowa Tribe to actually schedule and hold an election. The Oklahoma Supreme Court clarified this point as follows:

> The trial judge did not *order* the Kiowa Tribe to conduct an election, nor could he have done so. It is, in effect, of no concern to the state courts whether an election is in fact held. The trial court merely interpreted a state statute to mean that the Kiowa Indian Council is the governing body of the tribe and declared that the proper procedure for choosing commissioners to the Kiowa Housing Authority is by election.

Housing Authority of the Kiowa Tribe of Oklahoma v. Ware, 2000 OK 60, ___ P.3d ___ (Okla. 2000).

identified the governing body of the Tribe to be the KIC, 63 O.S. § 1057 required that the housing authority commissioners be selected by the KIC through election. Petitioners' appointments therefore are invalid.

Without regard to Petitioners' lack of standing to assert tribal claims, Petitioners have failed to demonstrate how the Oklahoma Housing Authorities Act, adopted with the approval of Congress and in furtherance of federal law, specifically the 1937 Act, could infringe on the Tribe's right of self-government. To find otherwise, would, suddenly and without precedent, restrain and restrict the rights of tribes to determine for themselves when to cooperate with or compact with States and state entities. Because the Petitioners have failed to state any compelling reason in support of their flawed position, the writ must be denied.

Respectfully submitted,

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